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Nos. 80-2078 and 80-2127

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-2078

DAMES & MOORE, A PARTNERSHIP,

Petitioner,

—v.—

DONALD T. REGAN, SECRETARY OF THE TREASURY OF THE UNITED STATES OF AMERICA, AND THE UNITED STATES OF AMERICA,

Respondents.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 80-2127

IRAN NATIONAL AIRLINES CORP., THE GOVERNMENT OF IRAN, AND THE UNITED STATES OF AMERICA,

Appellants,

—v.—

THE MARSCHALK COMPANY, INC.,

Appellee.

ON QUESTIONS CERTIFIED BY THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF THE MARSCHALK COMPANY, INC. TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

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MOTION OF THE MARSCHALK COMPANY, INC. TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

The Marschalk Company, Inc. ("Marschalk") respectfully moves this Court for leave to file a brief *amicus curiae* in support of petitioner in *Dames & Moore* v. *Regan*, No.

80-2078. The consents of the attorneys for respondents and for intervenor Bank Markazi Iran have been obtained. The consents of the attorneys for petitioner and intervenor the Government of Iran were requested but were not obtained. In the event this Court consolidates consideration of *Iran National Airlines Corp. et al.* v. *The Marschalk Company, Inc.*, No. 80-2127, with *Dames & Moore*, then Marschalk respectfully requests that the annexed brief be read as Appellee's Brief in No. 80-2127.

THE INTEREST OF THE AMICUS

Marschalk has a substantial interest in the proceedings before this Court. Pursuant to the Order of the United States Court of Appeals for the Second Circuit, *New England Merchants National Bank* v. *Iran Power Generation and Transmission Co.*, Docket Nos. 80-6254, *et al.* (2d Cir. April 9, 1981) (Appendix A hereto), Marschalk's $50,000 contract claim against Iran National Airlines Corp. and the Government of Iran was chosen by the United States District Court for the Southern District of New York (Duffy, J.) as the "single case [among approximately 150 cases against Iran pending in the Southern District of New York] in which the issues raised by the Iranian Agreement and the Presidential Orders are squarely presented . . . ." *Id.* (App. A11). On June 11, 1981, following a factual hearing on the merits of Marschalk's claim, the District Court issued an 89-page opinion holding, *inter alia*, that the President was without statutory or constitutional authority to strip Marschalk of its right to sue on its purely commercial contract claim in a domestic court, and to deprive Marschalk of property rights created by its attachment of Iranian property. *The Marschalk Company, Inc.* v. *Iran National Airlines Corp.*, 79 Civ. 7035 (S.D.N.Y. June 11, 1981).* By order dated June 15, 1981, the Court of Appeals for the Second Circuit certified to this Court, pursuant to § 28

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* This unpublished opinion has been lodged with the Court.

U.S.C., § 1254(3) and Supreme Court Rule 24, certain questions raised by the decision in *Marschalk*. (The order of the Court of Appeals is annexed as Appendix B hereto.)

Marschalk presents substantially the same legal issues raised in *Dames & Moore*, but in the context of a wholly domestic commercial case. We therefore respectfully request leave to file the annexed brief *amicus curiae*.

Respectfully submitted,

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Dated: June 19, 1981

QUESTIONS PRESENTED

The Marschalk Company, Inc. ("Marschalk"), a New York advertising agency, supplied advertising services to Iran National Airlines Corp. ("Iran Air"), an instrumentality of the Government of Iran, pursuant to a written agreement dated August 15, 1978. The services were performed exclusively in the United States and were periodically billed to Iran Air's offices in New York. Iran Air stopped paying Marschalk's bills in the fall of 1979 and still owes Marschalk approximately $50,000 for services Marschalk rendered under the contract. In December 1979, Marschalk filed suit against Iran and Iran Air in federal district court. The defendants have not contested Marschalk's services or the amounts at issue. Marschalk's suit thus involves a simple commercial claim ripe for judgment. In these circumstances:

1. Is there anything in the statutes or the Constitution of the United States empowering the President, by executive fiat, to divest Marschalk of its right to litigate its domestic commercial claim in a local court and to force Marschalk to pursue its claim before an Arbitral Tribunal in a foreign land without procedural guarantees, without a right to appeal and without any prospect of a fair recovery?

2. Is there anything in the statutes or the Constitution of the United States empowering the President, by executive fiat, to nullify the property rights obtained by Marschalk, a commercial claimant, pursuant to a judicial attachment secured under New York and federal law and authorized by federal license?

3. If the President was empowered to deprive Marschalk of its right to sue and to nullify its property rights, would such executive action, without compensation, constitute a violation of Marschalk's fifth amendment rights?

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OPINIONS AND ORDERS BELOW IN NO. 80-2127

The unreported opinion of the United States District Court for the Southern District of New York (Duffy, J.) in *The Marschalk Company, Inc.* v. *Iran National Airlines, Inc.*, 79 Civ. 7035 (S.D.N.Y. June 11, 1981), has been lodged with the Court. The order of the United States Court of Appeals for the Second Circuit certifying questions to this Court on June 15, 1981, pursuant to 28 U.S.C. § 1254(3) and Supreme Court Rule 24, is reprinted as Appendix B hereto.

JURISDICTION OF THIS COURT IN NO. 80-2127

The opinion of the District Court was filed June 11, 1981, with directions to the parties to seek immediate rehearing by the Court of Appeals, which had retained jurisdiction. *New England Merchants National Bank* v. *Iran Power Generation and Transmission Co.*, Nos. 80-6254 *et al.*, (2d Cir. Apr. 9, 1981) (App. A11). On June 15, 1981, upon the motion of certain bank-garnishees, the Court of Appeals certified questions to this Court, pursuant to 28 U.S.C. § 1254(3) and Supreme Court Rule 24. The certification was docketed with this Court on June 16, 1981.

STATEMENT OF THE CASE

The circumstances that have transformed Marschalk's ordinary contract claim into a "test case" of national significance are set forth in detail in the decision of the District Court and in the order of the Court of Appeals certifying questions to this Court (App. B2-4). We repeat that history here in abbreviated form.

Following the seizure of American hostages in Tehran on November 4, 1979, the President blocked the assets of Iran held by United States citizens and corporations. 31 C.F.R. § 535.201 (Nov. 14, 1979).

Pursuant to general licenses issued by executive order[1] and the provisions of federal and New York State law,[2] Marschalk obtained an *ex parte* order of prejudgment attachment on December 28, 1979 against assets of Iran and Iran Air in the Southern District of New York. (App. B3.) Marschalk levied upon these assets and, pursuant to federal and New York State law,[3] moved within 5 days to confirm the order of attachment. That motion was stayed pending resolution of common issues of law in 95 other cases in the District Court. *See New England Merchants National Bank* v. *Iran Power Generation and Transmission Co.*, 502 F. Supp. 120 (S.D.N.Y. 1980).

On September 26, 1980, the District Court ruled that assets of Iran and its instrumentalities were not immune from prejudgment attachment, 502 F. Supp. at 129-32; the District Court then certified an appeal of certain of the immunity questions pursuant to 28 U.S.C. § 1292(b), *New England Merchants National Bank* v. *Iran Power Generation and Transmission Co.*, 508 F. Supp. 49 (S.D.N.Y. 1980).

During the pendency of this interlocutory appeal, on January 19, 1981, President Carter concluded the Declaration of the Government of the Democratic and Popular Republic of Algeria ("Agreement I") and the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran ("Agreement II"). He also issued Executive Order No. 12,279, 46 Fed. Reg. 7919 (Jan. 19, 1981), purporting to terminate this and all other similar litigation and to nullify the attachments in this and all other similar cases. Thereafter, President Reagan ratified his predecessor's acts in Executive Order No. 12,294, 46 Fed. Reg. 14,111 (Feb. 26, 1981).

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1 31 C.F.R. § 535.504(a) (Nov. 23, 1979); 31 C.F.R. § 535.418 (Dec. 19, 1979).

2 Fed. R. Civ. P. 64; N.Y. C.P.L.R. §§ 6201 *et seq.*

3 Fed. R. Civ. P. 64; N.Y. C.P.L.R. § 6211(b).

By reason of these dramatic intervening events, the Court of Appeals for the Second Circuit remanded the consolidated cases to the District Court with instructions "to join the United States as a party in a single case in which the issues raised by the Iranian Agreement and the Presidential Orders are squarely presented and to proceed with confirmation hearings in that case alone." *New England Merchants National Bank* v. *Iran Power Generation and Transmission Co.*, Docket Nos. 80-6254 *et al.* (2d Cir. Apr. 9, 1981) (App. A11).

Following that directive, the District Court chose Marschalk's action as the test case and proceeded to hold a factual hearing. On June 11, 1981, the District Court issued an 89-page opinion granting Marschalk's motion to confirm its attachment, denying defendants' motion to vacate the attachment and denying Iran's motion to dismiss the complaint on grounds of sovereign immunity. In so ruling, the District Court held that the President was without statutory or constitutional authority to strip Marschalk of its right to sue on a purely commercial contract claim in a domestic court, and to deprive Marschalk of property rights created by its attachment of Iranian property.

On June 15, 1981, on the motion of several garnishee banks, the Court of Appeals for the Second Circuit certified to this Court three questions raised by the District Court decision. *The Marschalk Company, Inc.* v. *Iran National Airlines Corp.*, Docket Nos. 80-6254 *et al.* (2d Cir. June 15, 1981) (App. B).

ARGUMENT[4]

I.

THE EXECUTIVE HAS NO STATUTORY OR CONSTITUTIONAL AUTHORITY TO SUSPEND MARSCHALK'S RIGHT TO LITIGATE ITS CLAIM IN FEDERAL DISTRICT COURT.

The District Court in *Marschalk* correctly held that the President exceeded his authority in seeking to suspend or terminate the jurisdiction of the federal courts to adjudicate Marschalk's claim against Iran. There is no statute authorizing the President "to terminate all litigation," Agreement I, ¶ B, to "suspen[d]" all claims "which may be presented to the Iran-United States Claims Tribunal," Executive Order No. 12,294, 46 Fed. Reg. 14,111 (Feb. 26, 1981), or to declare that "all such claims shall have no legal effect in any action now pending in any court of the United States . . . ." *Id.*

The Government urges that statutory authority is in any event unnecessary, because the President possesses inherent constitutional power to take such action. This so-called "claims settlement power," it is contended, allows the President to interfere with the express jurisdiction of Article III courts over ordinary commercial claims. We most respectfully disagree. As demonstrated below, the broad inherent power claimed by the Government simply does not exist. The executive in fact has limited powers in settling expropriation and nationalization claims against foreign states, and even those limited powers are circumscribed by the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 *et seq.* (1976) ("FSIA"), and the Treaty of Amity, Economic Relations and Consular

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4 In this brief, Marschalk has attempted not to repeat many of the constitutional and statutory arguments made in other *amicus* briefs filed in support of the petitioner in *Dames & Moore*. Marschalk specifically joins in the arguments made in the *amicus* brief of Chas. T. Main International, Inc.

Rights between the United States and Iran, 8 U.S.T. 900 (entered into force June 16, 1957) (the "Treaty of Amity").

As we also describe below, the District Court properly rejected the legal fiction proferred by the Government that the Agreements and Executive Orders were valid because they constituted merely a "change in law." Whatever nominclature the Government uses, the Executive has no power to expropriate the commercial claim of a domestic corporation for public purposes and relegate the claimant—against its will—to uncertain arbitration in a foreign nation.

A. The "Claims Settlement Power" Does Not Justify the Executive's Actions.

The Government does not seriously contend that there exists a statutory basis for the President's action. Rather, it looks to a penumbral "claims settlement power" to justify the Iranian accords.[5] However, as the District Court held, there is no claims settlement power that can be asserted over Marschalk's domestic commercial claim. Moreover, the Executive did not "settle" Marschalk's claim; it expropriated the claim and used it as a bargaining chip to settle an international crisis.

1. Marschalk's claim has not been settled.

The only settlements achieved by the President's Iranian accords were (1) release of the 52 hostages held by Iran and (2) payment of $3.4 billion to various American banks.

Marschalk's claim was not settled. Marschalk has not been paid one penny and has no assurances that it will ever be paid.[6]

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5 Although the Government has argued that the President's action was also justified by the Executive's general Article II powers with respect to the conduct of foreign affairs, this assertion has been rejected in *American International Group, Inc.* v. *Iran*, Nos. 80-1779 *et al.*, Typed Opinion at 17 (D.C. Cir. June 5, 1981), and *The Marschalk Company, Inc.* v. *Iran National Airlines Corp.*, *supra*, Dist. Ct. Opinion at 48-51, *distinguishing United States* v. *Belmont*, 301 U.S. 324 (1937), and *United States* v. *Pink*, 315 U.S. 203 (1942).

6 Ironically, had the case not been "settled" by the Executive, Marschalk could have recovered its $50,000 long ago. Even without its prejudg-

Instead, this so-called settlement bars Marschalk from the local federal court in which it has litigated its claim and which has already held (1) that Marschalk has demonstrated a probability of success on the merits and (2) that there are no defenses to the claim. *Marschalk* Dist. Ct. Opinion at 85-87. "Settlement" of Marschalk's claim by the Executive also means "transfer" of the claim to a distant, unfamiliar and uncertain forum in a foreign country, without procedural guarantees and without any right of appeal.

Moreover, because Marschalk's claim is for $50,000, Marschalk will not be represented before this foreign arbitration Tribunal by counsel of its own choice or have any control over the presentation of its claim before the Tribunal. Agreement II, Art. III, ¶ 3. Instead, Marschalk's claim will be presented by the same Executive that has already ousted Marschalk from the federal court and nullified its attachment rights. While it is suggested that the Government's representation is a method to present the small claims economically, the practical result is that Marschalk's claim will be subject to further compromise—for whatever procedural or political ends the Executive deems important at the time.

2. The claims settlement power has never included power to terminate or suspend litigation over domestic commercial claims.

If there is an executive claims settlement power, its source is its existence as a "long-continued" practice. *Cf. United States* v. *Midwest Oil Co.*, 236 U.S. 459, 471-73 (1915) (executive's power to withdraw lands from private acquisition). However, that power cannot be stretched to justify "settlement" of Marschalk's domestic commercial claim. None of the historical precedents cited by the Government involves facts even remotely like those in *Marschalk*.[7]

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ment attachment of Iranian assets, the judgment would have been enforceable against Iranian assets located elsewhere. *E.g.*, Treaty of Amity, *supra*, Art. XI, ¶ 4.

7 Settlements by treaty, such as in *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), are inapposite here.

Recent executive settlement agreements cited by the Government typically deal with claims arising from a foreign government's expropriation of American-owned property abroad, and not with claims arising from normal commercial transactions in the United States. The China accords of 1979, for example, settled claims stemming from China's expropriation and nationalization of property in China 30 years earlier. Agreement Between the Government of the United States of America and the Government of the People's Republic of China Concerning the Settlement of Claims, T.I.A.S. 9306 (1979).[8] To the extent any recent agreements have dealt with obligations arising out of commercial arrangements,[9] the Government has yet to show that the settlements encompassed obligations arising from commercial transactions in the United States between American nationals and the foreign state.

Moreover, the customary procedures of past executive claims settlements stand in marked contrast to the procedures imposed by the Iranian Agreements. Recent executive agreements

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8 Other agreements demonstrate similar purposes. The Peruvian Agreement of 1976 concerned only the expropriated assets in Peru of an American mining company. Agreement Between the Government of the United States of America and the Government of Peru, 27 U.S.T. 3993, T.I.A.S. 8417 (1976). The Yugoslavian settlement dealt solely with compensation for claims arising from nationalization. Agreement Between the Government of the United States of America and the Government of Yugoslavia, 16 U.S.T. 1 (1965). The Polish agreement treated nationalized property and related debts arising outside the United States. Agreement Between the Government of the United States of America and the Government of the Polish People's Republic, 11 U.S.T. 1953, T.I.A.S. 4545 (1960).

9 *E.g.*, Agreement Between the Government of the United States of America and the Government of Egypt, T.I.A.S. 9589 (1979); Agreement Between the Government of the United States of America and the Government of the Hungarian People's Republic Concerning the Settlement of Claims, 24 U.S.T. 522, T.I.A.S. 7569 (1973); Agreement Between the Government of the United States of America and the Government of the People's Republic of Bulgaria Concerning Claims of United States' Nationals and Related Financial Matters, 14 U.S.T. 969, T.I.A.S. 5387 (1963); Agreement Between the Government of the United States of America and the Government of the Rumanian People's Republic Relating to Financial Questions Between the Two Countries, 11 U.S.T. 317, T.I.A.S. 4451 (1960).

have involved adjudication of claims by a statutorily created domestic claims commission. *See*, *e.g.*, 22 U.S.C. § 1643 (Cuba and China). Such a foreign claims settlement commission is composed of American members and answers to the Secretary of State, *see* 22 U.S.C. § 1622(c); Reorganization Plan 1, 19 Fed. Reg. 3985, 68 Stat. 1279 (1954). It offers procedural safeguards such as hearings, opportunity for objection, and the availability of subpoenas. *See* 22 U.S.C. § 1623. The commission typically evaluates the claims in preparation for the Executive's settlement negotiations with the foreign government.[10]

We are aware of no occasion in the history of executive claims settlements when the Executive exercised his settlement power by terminating or suspending domestic commercial claims pending in American courts and sending them to a foreign arbitral tribunal. Likewise, the Government can point to no prior "settlement" where an executive during peacetime purported to "nullify" attachments existing in pending domestic litigation.

3. The Foreign Sovereign Immunities Act removes Marschalk's commercial claim from any historical claims settlement power.

In any event, past executive claims settlements are of no precedential value in analyzing Marschalk's rights because congressional enactment in 1976 of the FSIA significantly altered the rules.

As set forth in the briefs of other *amici*, passage of the FSIA effectively gave Marschalk a judicial "claims settlement" pro-

10 Another settlement procedure involves establishment of a tribunal to adjudicate claims arising from an event with international implications. For example, a claims commission was established to hear claims for property damage caused by construction of a dam on the St. Lawrence River. *See* Agreement Between the Government of the United States and the Government of Canada Concerning the Establishment of an International Arbitral Tribunal to Dispose of United States Claims Relating to Gut Dam, 17 U.S.T. 1566, T.I.A.S. 6114 (1966), Agreement Between the Government of the United States of America and the Government of Canada Concerning the Settlement of Claims Relating to Gut Dam, 19 U.S.T. 7863, T.I.A.S. 6624 (1968).

cedure which replaced whatever executive procedure formerly existed. *See Texas Trading & Milling Corp.* v. *Federal Republic of Nigeria*, Docket Nos. 644 *et al.*, Slip Op. at 2602 (2d Cir. Apr. 16, 1981) (Congress enacted the FSIA specifically to provide "access to the courts to those aggrieved by the commercial acts of a foreign sovereign").

Significantly, the drafters of the FSIA specifically excluded from an early version of the Act provisions that would have empowered the executive branch to limit the FSIA's reach by *future* executive agreements. These provisions were deleted "to eliminate any possible question that this language might be construed to authorize a future international agreement" interfering with the FSIA's jurisdictional grant. H. R. Rep. No. 94-1487, 94th Cong., 2d Sess. 10 (1976).

Here, it is apparent that the Executive is seeking to limit Marschalk's right established by the FSIA to sue on its commercial claim in a federal court. Congress rejected this effort by the Executive when the Executive sought to have such power written into the FSIA, and this Court should reject the Executive's present attempt to rewrite the statute by executive fiat.

B. The "Change in Law" Argument Is a Fiction.

The Government contends that the termination or suspension of Marschalk's claim does not involve the FSIA jurisdiction of the federal court under 28 U.S.C. § 1330, but instead represents a change in the substantive law the Court must apply, citing *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801). We have been unable to discover, however, what law has been changed. Has the Executive rewritten the New York law of contracts? Has he amended title 28 of the United States Code?

In any case, the change of law argument fails not only because it is a legal mirage, but because, as the Court of Appeals for the Second Circuit has noted (App. A8), it begs the question as to the legality of the Agreements themselves.

The Government's reliance on *United States* v. *The Schooner Peggy*, *supra*, highlights the weakness of its "change of law" argument. In that case, a privateer had claimed the schooner Peggy pursuant to an Executive commission to capture armed French ships on the high seas. While the decision condemming the Peggy for the benefit of the privateer was on appeal, France and the United States entered into a treaty, withdrawing the commission and requiring the return of captured vessels not subject to finally adjudicated claims. No one challenged the power of the Executive (and Senate) to enter into the treaty, 5 U.S. at 110, and, accordingly, the Court held that the treaty required return of the Peggy and its contents. The principle for which *Schooner Peggy* stands is thus relatively simple: when a treaty effectively revokes the prior basis for a claim, the treaty is entitled to be enforced.

Marschalk's case is entirely different. The law upon which Marschalk's lawsuit was based is both substantive (the state common law of contracts) and procedural (the federal statutory law of personal and subject matter jurisdiction). We do not believe the Government seriously contends that the Executive is empowered to alter state contract law. Likewise, the Executive has no power unilaterally to alter acts of Congress conferring jurisdiction on federal district courts. The principle enunciated by this Court in *Schooner Peggy*, we submit, simply has no application here. The law on which Marschalk's claim is based cannot be and has not been altered by the Executive.

The suggestion that the forced "settlement" of Marschalk's claim constitutes a change in law supported by *Schooner Peggy* is equally groundless. The Court in *Schooner Peggy* simply did not consider whether the treaty constituted a settlement of the privateer's claims. In any case, the Government's present "settlement" did not pay any part of Marschalk's outstanding claim. The international crisis was indeed settled, but Marschalk is now forced to pursue its meritorious claim in a distant

forum where, years from now, it may receive a fraction of the claim's real value.[11]

II

THE EXECUTIVE ORDERS AND REGULATIONS IMPROPERLY ATTEMPT TO NULLIFY MARSCHALK'S ATTACHMENT RIGHTS.

The District Court properly held that Marschalk's attachment, obtained pursuant to license on December 28, 1979, conferred valid property rights, *Marschalk* Dist. Ct. Opinion at 76, *citing West Virginia Pulp & Paper Co.* v. *Peoples Home Journal, Inc.*, 233 App. Div. 376, 253 N.Y.S. 178 (1st Dept. 1931), that cannot be confiscated by the Government in the absence of statutory and constitutional authority and without just compensation. *Marschalk* Dist. Ct. Opinion at 76-77, *citing Armstrong* v. *United States*, 364 U.S. 40 (1960); *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555 (1935).

The Government nonetheless argues that the nullification order was directly authorized by Article II of the Constitution and by the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701 *et seq.* ("IEEPA"). Further, the Government contends that the taking of Marschalk's attachment does not violate Marschalk's fifth amendment rights because the license pursuant to which the attachment was granted was revocable. Thus, argues the Government, Marschalk was on notice that its attachment was conditional and that it had no reasonable

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11 We also respectfully disagree with the notion expressed by the First and District of Columbia Circuits that the "settlements" somehow created the grounds for a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6). The facts pleaded in Marschalk's complaint stated a claim in December 1979 and they state a claim today.

In the event this Court finds that there has been a change in law, we respectfully submit that to permit such a change to deprive Marschalk of its claims would cause a manifest injustice. The new law therefore should not be applied. *See Bradley* v. *Richmond School District*, 416 U.S. 696, 711-21 (1974).

expectation of compensable property rights. Each of the Government's contentions must fail.[12]

A. Only the Licenses Were Revocable.

The Government argues that Marschalk has no compensable interest in the property levied upon pursuant to its attachment because the license authorizing prejudgment attachment of Iranian assets is revocable. But nothing in the regulations cited by the Government (31 C.F.R. §§ 535.203, 535.418, 535.504 & 535.805), renders the *attachment* rights obtained pursuant to such a license revocable as well. The regulations purport only to warn a claimant that the *license* may be "amended, modified or revoked . . . ." 31 C.F.R. § 535.805 (Nov. 14, 1979).

Such a revocation would bar a subsequent attachment, but, as the District Court correctly held, the "revocation" cases relied upon by the Government do not support nullification of the property rights created by the attachments secured pursuant to an existing, unrevoked license. In each case, although revocation of a prior government license was upheld, the licensee was not divested of the property acquired before revocation. *Marschalk* Dist. Ct. Opinion at 79-81, *distinguishing United States* v. *Fuller*, 409 U.S. 488 (1973); *Acton* v. *United States*, 401 F.2d 896 (9th Cir. 1968), *cert. denied*, 395 U.S. 945 (1969); *Isthmian Airways, Inc.* v. *United States*, 94 Ct. Cl. 598 (1941).

The revocation theory now advanced by the Government has been recently minted. It was not raised in any of the numerous Statements of Interest filed by the Government before January 19, 1981 in support of its requests for stays of lower court

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12 Marschalk joins in the argument made in the Brief of Chas. T. Main International, Inc. as Amicus Curiae in Support of Petitioner in *Dames & Moore* that the President lacked authority under IEEPA to nullify Marschalk's attachment rights; in effect the President seized those property rights, even though such power was withdrawn by Congress in 1977. Additionally, Marschalk relies upon the fifth amendment arguments made in the Brief of Amicus Curiae in Support of Petitioner's Right to Compensation in *Dames & Moore*.

proceedings. Similarly, prior to January 19, 1981 representatives of the Government repeatedly acknowledged that the attachment rights of United States claimants prevented the United States from simply lifting the freeze of Iranian assets and releasing the assets to Iran in exchange for the hostages.[13]

B. The Conditional Nature of the License Does Not Eliminate Marschalk's Rights.

The Government also argues that because the regulations prohibited Marschalk from taking possession of the attached assets or executing a judgment against them without a further license, Marschalk and the other plaintiffs cannot complain of nullification because they were on notice that their attachment rights might ultimately be valueless.

Marschalk did not engage in a meaningless gesture when it obtained an order of attachment in December 1979. President Carter, in announcing the blocking order to Congress, specifically stated that one purpose was to assist and protect American creditors' rights. President Carter's Message to Congress, 15 Weekly Comp. of Pres. Docs. 2117 (Nov. 14, 1979). Marschalk had every reason to rely upon such statements and to expect that, at a later time and under the proper circumstances, further licenses would issue allowing entry of judgment and collection of attached assets. Marschalk's reliance cannot be ignored. *See Marschalk* Dist. Ct. Opinion at 81.

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13 *See N.Y. Times*, Dec. 22, 1980, at A-1, A-13, col. 1; *N.Y. Times*, Nov. 3, 1980, at A-1, A-15, col. 2; *Wall St. J.*, Nov. 3, 1980, at A-3, col. 2; Iranian Assets Lit. Rptr., Dec. 5, 1980, at 1,906 ("Secretary [of State] Muskie added that [President] Carter cannot go beyond a certain point [in the negotiations], and Iran must understand 'the legal constraints within which we must operate.' Those legal constraints, sources say, preclude any effort to override court attachments to return Iran's assets."); *id.* at 1,908 ("[T]he U.S. is continuing to spell out to Iran the limits of the Executive's authority over the Judicial Branch.").

C. Under Prior Decisions of This Court, Marshalk Acquired a Property Interest by Reason of its Attachment.

The Government argues that the decision of this Court in *Orvis* v. *Brownell*, 345 U.S. 183 (1953), put Marschalk on notice that its attachment rights could be annulled at any time by the Government. We respectfully submit that the Government has misread *Orvis*. In fact, *Orvis* and its predecessor, *Zittman* v. *McGrath*, 341 U.S. 446 (1951) ("*Zittman I*"), hold that, despite executive vesting orders, valid and authorized attachments protect the rights of domestic creditors against foreign debtors. As a consequence, under these cases, even where the Executive is authorized by statute to take possession of attached foreign property, which is not the case here, it cannot dispose of that property by simply returning it to its original foreign owners.

Thus, in *Zittman I*, *supra*, the Court held that attachments obtained under New York law after a blocking order create rights against the original foreign owners that were not cancelled or annulled under a vesting order issued by the Executive pursuant to the Trading With the Enemy Act, 50 U.S.C. App. § 5(b). Significantly, in *Zittman I*, the initial blocking order did not prohibit attachment liens; a redefinition of the terms of the blocking order, issued after the creditors' attachments were obtained, was held ineffective as to the prior attachments.[14] Here, although the original blocking order prohibited attachments, that prohibition was lifted prior to the time Marschalk obtained its attachment liens against Iran's assets in New York.

This holding was expressly reaffirmed by the Court in *Orvis* v. *Brownell*, *supra*, 345 U.S. at 186, and is not affected by the additional holding of *Orvis* that an unauthorized attachment

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14 In a second case, *Zittman* v. *McGrath*, 341 U.S. 471 (1951), the Court held that pursuant to a federal vesting order directing that identified funds be turned over to him, the Alien Property Custodian "has power to possess himself of the funds and to administer them" for the payment of debts to American creditors. 341 U.S. at 474.

secured after issuance of a federal blocking order was not enforceable against the Alien Property Custodian who later took possession of the foreign assets for the benefit of all domestic claimants.

Orvis v. *Brownell* confronted factual and legal conditions materially different from those now before this Court. First, unlike the *Orvis* claimant, Marschalk obtained attachment rights pursuant to a license granted by the Government. Second, in *Orvis* the Alien Property Custodian, acting pursuant to the Trading with the Enemy Act, was clearly authorized to vest frozen assets and take them into possession. Vesting is not authorized in the instant cases under IEEPA.

Here, the Government argues that it is merely transferring foreign assets, within the literal language of IEEPA. In fact, under the Iranian Agreements, the Government intends to release approximately $1.2 billion of blocked financial assets directly to Iran, *see* Agreement I, ¶ 7, notwithstanding Marschalk's attachment. Another $1 billion of blocked financial assets will be transferred to a separate foreign escrow account, reportedly at the Bank of England, to satisfy the awards of the arbitral Tribunal, *id.*, again notwithstanding Marschalk's attachment.

As to the assets destined to be paid directly to Iran, the principle of *Zittman I*, as reaffirmed in *Orvis*, supports the conclusion that the order unblocking the Iranian assets does not affect Marschalk's attachment lien as against the Iranian debtor. Therefore, the assets cannot be released to Iran free of Marschalk's lien. As to the assets destined for the Bank of England, the purported "transfer" can be viewed as either a vesting of the assets by the Government or an indirect release of the assets for the benefit of Iran. Under either of these interpretations, the Executive's naked "transfer" is unlawful. As other *amici* argue, if the transfer is a vesting, it is unlawful under IEEPA and is not authorized by *Orvis*. If the transfer is an indirect release of assets to Iran, then according to *Zittman I*, the Government cannot extinguish Marschalk's attachment lien.

CONCLUSION

For the foregoing reasons, The Marschalk Company, Inc. respectfully requests this Court to (1) reverse the District Court decision in *Dames & Moore* v. *Regan*, No. 80-2078; (2) answer questions one and two certified by the Court of Appeals for the Second Circuit in *Iran National Airlines Corp.* v. *The Marschalk Company, Inc.*, No. 80-2127, in the negative, and question three in the affirmative; and (3) affirm in its entirety the District Court decision in No. 80-2127.

Respectfully submitted,

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Dated: June 19, 1981

CERTIFICATE OF SERVICE

I am a member of the bar of this Court and hereby certify that prior to 3:00 p.m. on this 19th day of June, 1981, I caused to be served three copies of the foregoing Brief by hand to the attorneys for the parties at the following addresses:

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I further certify that all parties required to be served have been served.

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June 19, 1981

APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1049-1144, 1145-1224, 1225-1227, 740

September Term, 1980

(Argued March 30, 1981 Decided April 9, 1981)

Consolidated Appeals Docket Nos.
80-6254 through 80-6349 inclusive, and
related Docket Nos. 80-7912 through 80-7999,
81-7054, 81-7062 and 81-7064, 80-3063,
80-9001, 80-9004 through 80-9007

NEW ENGLAND MERCHANTS NATIONAL BANK,

Plaintiff-Appellee,

—v.—

IRAN POWER GENERATION AND TRANSMISSION COMPANY, THE IRANIAN MINISTRY OF ENERGY AND NATURAL RESOURCES, THE GOVERNMENT OF IRAN, THE IRANIAN MINISTRY OF ECONOMIC AFFAIRS AND FINANCE,

Defendants-Appellants,

UNITED STATES OF AMERICA,

Appellant.

(and related cases)

App. A 2

Docket No. 80-3063

IN RE: UNITED STATES OF AMERICA,

Petitioner.

Before:

TIMBERS, VAN GRAAFEILAND and MESKILL,
Circuit Judges.

Interlocutory appeal from a judgment of the United States District Court for the Southern District of New York (Duffy, *J.*) ruling that certain Iranian defendants were not entitled to sovereign immunity from prejudgment attachment pursuant to *ex parte* attachment orders issued under N.Y. Civ. Prac. L. R. § 6211(a) (McKinney 1980). Appeal from, and petition for a writ of mandamus regarding, denial of the United States' request for an indefinite stay.

Remanded.

[appearances omitted]

MESKILL, *Circuit Judge*:

The plaintiffs in these 96 consolidated cases are commercial entities with claims against the Islamic Republic of Iran and various of its agencies or instrumentalities (hereinafter collectively referred to as "Iran"). After witnessing a period of worsening political and economic relations, which culminated in the seizure of the American Embassy in Teheran and its personnel on November 4, 1979, the plaintiffs brought suit against Iran under the Foreign Sovereign Immunities Act of

1976, 28 U.S.C. §§ 1330, 1602-11 (Supp. III 1979) (FSIA). Upon commencing suit, the plaintiffs sought and obtained pursuant to N. Y. Civ. Prac. L. R. § 6211(a) (McKinney 1980) *ex parte* orders of prejudgment attachment upon the "frozen" Iranian assets in New York.[1] At the subsequent confirmation hearings,[2] the Iranian defendants moved to vacate the attachments, arguing that a foreign state and its instrumentalities are immune from prejudgment attachment under the FSIA and the 1955 Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran, 8 U.S.T. 899 ("Treaty of Amity").[3] These cases were referred to Judge Duffy for resolution of the sovereign immunity issue.

On September 26, 1980, the district court rendered an Opinion and Order resolving the sovereign immunity issue. *New England Merchants National Bank* v. *Iran Power Generation and Transmission Co.*, 502 F.Supp. 120 (S.D.N.Y. 1980). While ruling that Iran had not waived its immunity from prejudgment attachment under the FSIA or the Treaty of

1 Invoking the powers of the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1706 (Supp. III 1979) (IEEPA), President Carter on November 14, 1979 issued Executive Order 12,170, which ordered the blocking of "all property and interests in property of the Government of Iran . . . subject to the jurisdiction of the United States" and authorized the Secretary of the Treasury to promulgate regulations to implement the freeze order. Pursuant to this authority, the Secretary promulgated the Iranian Assets Control Regulations, 31 C.F.R. §§ 535.101-.904 (1979), which among other things granted conditional licenses authorizing suits against Iran, § 535.504, and attachment of Iranian assets, § 535.418.

2 N.Y. Civ. Prac. L. R. § 6211(b) (McKinney 1980) provides that "[a]n order of attachment granted without notice shall provide that within a period not exceed five days after the levy, the plaintiff shall move, on such notice as the court shall direct to the defendant . . . for an order confirming the order of attachment."

3 Although the FSIA was enacted after the Treaty of Amity, § 1609 of the FSIA provides that immunity from attachment and execution is "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act." 28 U.S.C. § 1609 (Supp. III 1979).

Amity, the court concluded that the Presidential freeze had "suspended" Iran's immunity from prejudgment attachment. Judge Duffy did not pass upon the plaintiffs' additional argument that Iran had forfeited its immunity by reason of its hostile acts toward the United States. The Government's request for an indefinite stay was denied, with Judge Duffy stating that on balance his decision did not "in any way, impinge on the enormous prerogatives vested in the President" to handle foreign affairs. *Id.* at 133. Having decided the common question presented to him, Judge Duffy referred the cases back to the various district judges for resolution of the non-common issues.[4]

Immediately following this decision, the United States moved on October 6, 1980 for a stay of further district court proceedings pending appellate review. The Government also sought leave to intervene and moved for certification under 28 U.S.C. § 1292(b) (1976) of the court's refusal to grant its request for an indefinite stay. On November 5, 1980, Judge Duffy denied these motions. On November 25, 1980, the Government filed a notice of appeal of the September 26 Opinion and Order, claiming that the denial of its request for a stay was appealable under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Finally, on December 19, 1980, the Government petitioned for a writ of mandamus to compel the district court to stay the proceedings. A panel of this Court on December 23 scheduled briefing on the petition for mandamus and temporarily stayed proceedings in the district court pending its decision on the petition.

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4 Before an attachment may be confirmed, the plaintiff must show "that there is a cause of action, that it is probable that the plaintiff will succeed on the merits, that one or more grounds for attachment provided in section 6201 exist, and that the amount demanded from the defendant exceeds all counterclaims known to the plaintiff." N. Y. Civ. Prac. L. R. § 6212(a) (McKinney 1980). Section 6201 states that an order of attachment may be granted in a damage action where, *inter alia*, the defendant "is a nondomiciliary residing without the state, or is a foreign corporation not qualified to do business in the state" or where the defendant, "with [the] intent to defraud his creditors . . . has assigned, disposed of, encumbered or secreted property or removed it from the state or is about to do any of these acts." N. Y. Civ. Prac. L. R. § 6201 (McKinney 1980).

Recognizing that there was "substantial room for differences of opinion" on the sovereign immunity issue and that immediate appeal could "materially advance the termination of this litigation," Judge Duffy on December 22, 1980 certified four questions to this Court:

1. Did Executive Order No. 12,170 (November 14, 1979), 44 Fed. Reg. 67729, the Treasury Regulations promulgated thereunder and President Carter's subsequent reports to Congress suspend, dissolve or terminate the immunity from pre-judgment attachment that would otherwise be available to defendants under the Foreign Sovereign Immunities Act of 1976 and the Treaty of Amity?

2. If the answer to No. 1 above is yes, does the International Emergency Economic Powers Act (50 U.S.C. §§ 1701, *et seq.*) authorize the suspension, dissolution or termination of defendants' immunity from pre-judgment attachment in the manner that the Court found had occurred here?

3. If the answers to Nos. 1 and 2 above are yes, is the International Emergency Economic Powers Act constitutional as applied?

[4.] Whether sovereign immunity of the defendants under the Foreign Sovereign Immunities Act with respect to pre-judgment attachment has been waived, terminated or suspended by virtue of (a) the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran, or (b) the severance of diplomatic relations between the United States and Iran and actions taken by Iran in violation of international law.

Judge Duffy specifically refused to certify whether the lifting of the freeze would terminate the attachments, stating that "[s]uch a contingency is simply not a 'case or controversy' properly before any court at the present time." On January 5,

1981, this Court issued an order permitting interlocutory appeal of the certified questions, granted the Government's motion for an expedited appeal, continued the previously granted stay, and scheduled argument on all points raised by the petition and the appeal.

Subsequent events radically changed the focus and posture of this appeal. On January 19, 1981, President Carter entered into a series of agreements to secure the release of the American hostages.[5] Under the agreements, most claims are to be submitted to binding, non-reviewable arbitration before a Claims Tribunal. Iran agreed to establish a security account which would be initially funded by a deposit of $1 billion in previously frozen funds and securities, and promised to replenish the fund whenever it fell below $500 million, until all awards are paid. In return, the United States promised to "act to bring about the transfer [of Iranian funds and securities held in U.S. banks] within six months." Crucial to the settlement was the promise of the United States to

> terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration.

To implement these agreements, President Carter issued Executive Orders 12276 through 12285 which, *inter alia,* revoked the previously issued license to attach the frozen assets, nullified

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5 The agreements are comprised of the Declaration of the Government of the Democratic and Popular Republic of Algeria, which sets forth the general principles of the settlement; the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, which sets forth the terms and conditions of claims settlements between the two nations; and several undertakings, a related escrow agreement, and various banking documents.

all post-freeze rights of non-Iranians in the assets, precluded United States citizens from acquiring further rights in the assets, directed those entities holding Iranian funds and securities to transfer them to the Federal Reserve Bank of New York, and required those holding other frozen assets to transfer the property as directed by Iran.[6] On February 24, 1981, President Reagan ratified the terms of the agreement, and issued the following Executive Order concerning claims pending against Iran:

> Section 1. All claims which may be presented to the Iran-United States Claims Tribunal under the terms of Article II of the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, and all claims for equitable or other judicial relief in connection with such claims, are hereby suspended, except as they may be presented to the Tribunal. During the period of this suspension, all such claims shall have no legal effect in any action now pending in any court of the United States, including the courts of any state or any locality thereof, the District of Columbia and Puerto Rico, or in any action commenced in any such court after the effective date of this Order.

Exec. Order No. 12,294, 46 Fed. Reg. 14,111 (1981). Regulations implementing this order provide that "[u]ntil the Secretary of the Treasury determines that the authority of the United States to order these transfers has been the subject of a definitive legal ruling, the United States Government will not seek to impose civil or criminal sanctions on any party who does not make the transfers required by [the orders and regulations]." 31 C.F.R. § 535.221(b) (1981).

The parties essentially agree that the four certified questions are no longer central to this case, having been supplanted by a

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6 *See* 46 Fed. Reg. 7913, 7915, 7917, 7919, 7921, 7923, 7925, 7927, 7929, and 7931 (1981).

single, overriding question: Were the actions of the President in suspending the lawsuits and nullifying the attachments consistent with constitutional power and any applicable satutory authority? Nevertheless, the Government forcefully argues that the Executive Orders and Treasury Regulations implementing the settlement agreement constitute an intervening change in law which this Court is bound to apply, *see United States* v. *Schooner Peggy,* 5 U.S. (1 Cranch) 103 (1801), even in the context of this somewhat outdated interlocutory appeal, *see Bersch* v. *Drexel Firestone, Inc.,* 519 F.2d 974, 994-95 (2d Cir.), *cert. denied,* 423 U.S. 1018 (1975). Of course, essential to the Government's argument is its contention that the settlement agreement is valid and enforceable, an issue which was neither decided in the district court nor briefed in this Court. In so contending, the Government would have us decide at this juncture delicate questions concerning the statutory and constitutional authority of the Executive to make and enforce the Executive Orders and Treasury Regulations here at issue. Although we are mindful of the necessity for a speedy resolution of these questions, we must reject the Government's invitation and remand this case for further development in the district court.

In the first place, the questions we are asked to decide are posed in the abstract; the original dispute which brought this case before us has been swept to the sidelines. To appreciate the degree of attenuation between the original disputes and the legal question now pressed upon us, one need only review the manner in which this case arrived in this Court. These cases were referred to Judge Duffy to decide a preliminary issue (sovereign immunity) in connection with a provisional remedy entered *ex parte.* The only issue decided below, certified to us, and briefed by the parties was whether sovereign immunity stood as a bar to prejudgment attachment of Iran's frozen assets. Since the settlement agreement, many of these parties, including New England Merchants National Bank, have been paid the full amount claimed in their complaints. Others are willing to try their luck before the Claims Tribunal and seek recourse against the United States in the event of a shortfall.

Still other plaintiffs contend that their claims against the defendants fall outside the scope of the agreements and therefore should not be subject to a stay. None of the *ex parte* attachments has been confirmed, and it is quite likely that some will be vacated for failure to comply with the requirements of N. Y. Civ. Prac. L. R. § 6211(b) (McKinney 1980). Under these circumstances, a definitive ruling by this Court on the scope, validity, and effect of the settlement agreement would come perilously close to an advisory opinion. This lack of concreteness, together with the novelty and delicacy of the issues, counsels us to remand this case to the district court so that any challenge to the settlement agreement can be decided in the context of a live controversy, after full briefing and any necessary fact-finding.

Moreover, even if, as the Government suggests, we have that power to decide these issues now, we do not think that that power would be wisely exercised in the present context of this case. *See Singleton* v. *Wulff,* 428 U.S. 106, 120-21 (1976). Ordinarily, "where circumstances have changed between the ruling below and the decision on appeal, the preferred procedure is to remand to give the district court an opportunity to pass on the changed circumstances," unless the new situation "demands one result only." *Korn* v. *Franchard Corp.,* 456 F.2d 1206, 1208 (2d Cir. 1972); *accord, Concerned Citizens of Vicksburg* v. *Sills,* 567 F.2d 646, 649-50 (5th Cir. 1978); *see also Singleton* v. *Wulff, supra,* 428 U.S. at 121. Although the United States optimistically contends that this case "demands one result only," the tangle of conflicting factual and legal claims raised in these 96 "common" claims betrays the Government's forecast.

The First Circuit, when confronted with a virtually identical situation involving a post-settlement appeal of a pre-settlement provisional remedy, remanded the case to the district court for reconsideration in light of the intervening events. *Chas. T. Main International, Inc.* v. *Khuzestan Water & Power Authority,* No. 80-1027 (1st Cir. Feb. 23, 1981); *see also Electronic Data Systems Corp. Iran* v. *Social Security Organization of the Government of Iran,* 610 F.2d 94 (2d Cir. 1979) (remanding

attachment order in light of intervening circumstances, including Embassy takeover and "freeze order"). Similarly, in *United States* v. *Michigan,* 623 F.2d 448 (6th Cir. 1980), an appeal had been taken from a district court order which had ruled that Michigan Indians were not bound by certain state fishing laws, despite Michigan court decisions to the contrary. In the interim, the Secretary of the Interior promulgated comprehensive fishing regulations pursuant to his delegated power to govern Indian affairs. The Sixth Circuit remanded the case to the district court for consideration of the preemptive effect of the new regulations. Finally, in *Welch* v. *Schultz,* 482 F.2d 780, 782-83 (D.C. Cir. 1973), the court remanded a suit challenging a ban on contributions to North Vietnam in light of the subsequent peace agreement with that country. In declining to decide the case, the *Welch* court stated:

> We are not able to measure with any reasonable degree of precision the possible impact of this turn of events upon the quarrel in which the litigants became embroiled. The change in circumstances which has overtaken this appeal may well have seriously modified the controversy which the parties briefed and argued here, or even actually mooted it. . . . By the same token, the basis for decision of any dispute which may have survived that agreement may, at the very least, have taken on an added dimension.
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> . . . .
>
> In sum, an accurate assessment of the current status of the controversy requires exploration and reappraisal, and any residual problems call for definition and examination afresh on an up-to-date factual record.

Id. at 783 (footnotes omitted).

Like the court in *Chas. T. Main, supra,* we are aware of the need for a prompt judicial determination of the enforceability of the settlement agreement, lest the United States be held in breach of its promise to transfer assets to Iran by July 19, 1981. The district court is instructed to, and undoubtedly will, proceed with expedition. At the same time, however, we cannot

in the name of expediency decide a question which is not properly before us. Were we to do so, we would be engaging in the sort of "almost irresponsibly feverish" review, *New York Times* v. *United States,* 403 U.S. 713, 753 (1971) (Harlan, *J.*, dissenting), which too often can give truth to Justice Holmes' statement, "Great cases like hard cases make bad law." *Northern Securities Co.* v. *United States,* 193 U.S. 197, 400 (1904) (Holmes, *J.*, dissenting).

The petition for mandamus is denied. This Court's stay of proceedings in the district court is continued, with the following exception: The cases are remanded to Judge Duffy with instructions to join the United States as a party in a single case in which the issues raised by the Iranian Agreement and the Presidential Orders are squarely presented and to proceed with confirmation hearings in that case alone. In that manner, the issues raised as to the scope, validity, and effect of the Agreement and Orders can be quickly resolved and the district court's determination returned to this Court for prompt review. Further proceedings in all other actions are stayed until the further order of this Court. This panel will retain jurisdiction.

VAN GRAAFEILAND, *Circuit Judge* (Concurring):

I concur with the majority in all cases except those in which Marine Midland Bank, GTE International, Inc., and Westinghouse Electric are parties. I have not participated in the determination relative to those cases.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 1049-1144—September Term, 1980

Docket Nos. 80-6254 et al.

Date Filed: June 15, 1981

THE MARSCHALK COMPANY, INC.,

Plaintiff-Appellee,

—v.—

IRAN NATIONAL AIRLINES CORP. and
THE GOVERNMENT OF IRAN,

Defendant-Appellants,

UNITED STATES OF AMERICA,

Intervenor-Appellant.

Before:

TIMBERS, VAN GRAAFEILAND and MESKILL,
Circuit Judges.

ORDER CERTIFYING QUESTIONS TO THE SUPREME COURT OF THE UNITED STATES

The judges of this panel having encountered questions of law upon which instructions are desired, and in the interest of

proper administration and expedition of judicial business, *see Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957), the following questions are hereby certified to the Supreme Court of the United States pursuant to 28 U.S.C. § 1254(3) (1976) and Supreme Court Rule 24.

Statement of Facts

Iran National Airlines Corp. (IRAN AIR), an instrumentality of the Government of Iran licensed to do business in New York, entered into a contract effective August 15, 1978 with the Marschalk Company, Inc. (MARSCHALK), a New York corporation, for the performance of advertising services in the United States. Under the contract, Marschalk was to act as Iran Air's advertising agent in the United States for one year from the date of the contract, and thereafter unless proper notice of cancellation was given. In accordance with its contractual duties, Marschalk created and placed advertisements in print media in various markets in the United States, billing Iran Air for the work when the advertisements were published. After a brief period of punctual payments, Iran Air began to fall behind in its payments to Marschalk. By November 30, 1979, Marschalk had invoiced Iran Air for $46,528.02, no part of which had been paid. Iran Air neither contested the invoices nor objected to Marschalk's performance under the contract.

During the same period, relations between the United States and Iran had worsened. In response to the November 4, 1979 seizure of American hostages, President Carter on November 14, 1979 declared a national emergency and issued Executive Order 12,170, which ordered blocked "all property or interests in property" of Iran within the jurisdiction of the United States and which authorized the Secretary of Treasury to implement the freeze order with appropriate regulations. 44 Fed. Reg. 65,729. Pursuant to this authority, the Secretary issued regulations which blocked the removal or transfer of Iranian assets in the United States except according to the terms of licenses accompanying the freeze order or issued thereunder. 31 C.F.R.

Part 535. Specifically, the regulations provided, "Unless licensed or authorized pursuant to this part any attachment, judgment, decree, lien, execution, garnishment, or other judicial process is null and void with respect to any property in which on or since the effective date there existed an interest of Iran." 31 C.F.R. § 535.203(e). On November 21, 1979, the Secretary promulgated a regulation stating that "[t]he provisions of this part and any rulings, licenses, authorizations, instructions, orders, or forms issued thereunder may be amended, modified, or revoked at any time." 31 C.F.R. §535.805. On November 26, 1979 the Secretary promulgated a regulation authorizing "judicial proceedings" against Iran with the exception of "the entry of any judgment or of any decree or order of similar or analogus effect." 31 C.F.R. § 535.504(a), (b)(1). On December 19, 1979, the Secretary promulgated a regulation which explained that "[t]he general authorization for judicial proceedings contained in § 535.504(a) included pre-judgment attachments." 31 C.F.R. § 535.418.

On December 28, 1979, Marschalk filed suit in the United States District Court for the Southern District of New York seeking judgment against Iran Air and Iran in the amount of $46,528.02 plus interest and costs. [On the same day], the district court granted, pursuant to N.Y. Civ. Prac. L.R. § 6211(a) (McKinney), an *ex parte* order of attachment against defendant's assets located in several banks. On September 26, 1980, the district court ruled in 96 consolidated cases that Iran's assets were not immune from pre-judgment attachments. *New England Merchants National Bank v. Iran Power Generation and Transmission Co.*, 502 F.Supp. 120 (S.D.N.Y. 1980). The cases were then returned to the individual district judges for confirmation pursuant to N.Y. Civ. Prac. L.R. § 6211(b).

Before the *ex parte* attachment in Marschalk could be confirmed, however, President Carter on January 19, 1981 entered into an agreement with Iran to secure the release of the hostages. The initial agreement calls for the establishment of

an Iran-United States Claims Tribunal which, with certain exceptions, will arbitrate all unsettled claims and whose awards will be "final and binding" and "enforceable . . . in the courts of any nations in accordance with its laws." Under the terms of the agreement, the United States is obliged to

> "terminate all legal proceedings in the United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration."

To implement the agreement, President Carter issued Executive Orders 12,276 through 12,285, which revoked the licenses permitting attachments of frozen assets, nullified the attachments required under those licenses, and required those holding frozen assets to turn them over to the Federal Reserve Bank for transfer to Iran. On February 24, 1981 President Reagan ratified the January 19, 1981 Executive Orders and ordered the "suspension" of "[a]ll claims which may be presented to the [Tribunal]", stating that "such claims shall have no legal effect in any action now pending in any court of the United States. . . ." 46 Fed. Reg. 14,111 (1981).

The district court found that Marschalk's claim would, under the terms of the agreement, fall within the jurisdiction of the Claims Tribunal. The court declined to suspend the litigation of the claim, however, ruling that the agreement and Executive Orders issued in furtherance thereof were not within the Executive's statutory or constitutional authority, and thus were invalid and unenforceable. Having found that Marschalk had demonstrated likelihood of success on the merits, *see* N.Y. Civ. Prac. L.R. § 6212(a) (McKinney), the district court confirmed the attachment and denied motions to dismiss the suit and vacate the attachments.

Questions Certified

(1) Was the action of the President in suspending claims which may be presented to the Claims Tribunal and in declaring that they shall have no legal effect in the courts of the United States within his statutory and/or constitutional authority?

(2) Was the action of the President in nullifying the attachments acquired on blocked assets and requiring the transfer of those assets to Iran within his statutory and/or constitutional authority?

(3) Did the action of the President in suspending the claims or nullifying the attachments constitute a taking of property for which compensation must be paid?

s/ WILLIAM H. TIMBERS
William H. Timbers

s/ ELLSWORTH A. VAN GRAAFEILAND
Ellsworth A. Van Graafeiland

s/ THOMAS J. MESKILL
Thomas J. Meskill

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Second Circuit
A. Daniel Fusaro, Clerk